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No. 525

IN THE

SUPREME COURT of the UNITED STATES

October Term, 1962

WILLIAM H. LOEHDE and JESSIE CAROLYN LOEHDE, his wife,

Petitioners,

vs.

WISCONSIN RIVER POWER COMPANY, a Wisconsin Corporation, and WALTER BUCHANAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT, WISCONSIN RIVER POWER COMPANY, IN OPPOSITION

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OPINIONS BELOW

The memorandum of the District Court reproduced at pages 119-129 of the Appendix. The opinion of the Court of Appeals is reported in 304 Fed. 2d 433.

QUESTIONS PRESENTED

1. Does the evidence support the conclusions of the court?

2. Does petitioners' petition for writ of certiorari contain any basis for the issuance of a writ?

SUPPLEMENTARY STATEMENT OF FACTS

It appears from the testimony that one of the plaintiffs, William H. Loehde, is a real estate dealer, residing in the City of Chicago, Illinois; that his co-plaintiff, Jessie Carolyn Loehde, is his wife; that the plaintiff, William H. Loehde, has been in the investment business and real estate business in the City of Chicago area for the past sixty years. (Appellants' Appendix 57.) He has a broker's license and knows what Revenue Stamps mean on a deed and knew this when he attached $6.60 stamps on the deed which he delivered to the defendant company, showing that the consideration he had in mind for a transfer of the property involved in this suit was $6,000.00. (Appellants' Appendix 57.) He has been an acquaintance of Mr. C. C. Fuller, often mentioned in this transaction with the defendant company, since 1910. Mr. Fuller married a daughter of one of his associates, and Mr. Loehde visited the Fuller home at numerous times prior to 1948. (Appellants' Appendix 57.) As far back as 1926, the plaintiff had a contract to purchase the land in question with one Freeman for $1,250.00. (Appellants' Appendix 57, 58.) Mr. Fuller took a tax deed on this property while it was under contract for purchase from Freeman. Then Fuller transferred the property to one Cassel, who was associated with Loehde; and Cassel then immediately

transferred the property to Loehde, who had advanced the money for the purchase. (Transcript 191, 192; transaction not in printed case.) Loehde paid $350.00 for the property when acquired in 1939. (Appellants' Appendix 58.) After some correspondence with Mr. Fuller, Loehde wrote Mr. Fuller, authorizing the company to enter on his lands and use it for whatever need it had for the same. In that letter he says: "It appears that the company has a definite purpose for the Loehde forty acres, and my purpose is to cooperate through you to the end that you acquire the same for the company *at a fair value.*" (Transcript 211.) Subsequently, Mr. Loehde prepared a warranty deed from himself and wife to the power company, dated April 10, 1948. (Exhibit 13; Transcript 212, 213.) He deposited this deed in the Necedah Bank, of which Fuller was President. The deed was to be in exchange for land the company had but the particular land was never located or agreed upon. The deed is still in escrow at the Necedah Bank *and has never been withdrawn by the plaintiff.* The consideration for the deed had not been agreed upon but it was to be in exchange for other land at a *"fair value."* (Exhibit 13.) All this time Loehde knew that Fuller was an officer of the company and that it did not influence his relations with Mr. Fuller, who had been an old-time acquaintance. (Appellants' Appendix 61.) He was willing to take $6,000.00 for the land as indicated by his deed and as testified to by him. (Appellants' Appendix 62.) With the deed he also sent an abstract. (Transcript 225.) He testified that the company needed the land and that his forty was to be in trade for a large piece to be divided between Thiele, Fuller and Loehde at a *"fair value."* (Appellants' Appendix 63; Transcript 235.) He is asking now in this suit $160,000.00

from the company for the property for which he paid $350.00. The $160,000.00 he claims is a "*fair payment*" to him for the profit the company made through the use of the property. (Appellants' Appendix 64.) In writing Mr. Fuller (Exhibit 7), he states: "Mr. Thiele expressed some concern about emergency matters of minor importance relative to the forty acres, in respect to which I assured him he could move and you would be in charge and protect my interest." (Appellants' Appendix 64.) The *undisputed testimony* with reference to the value of the land is that it was not worth more than $760.00; and the court so found. (Findings 14-15; Appellants' Appendix 127.)

After the construction of the dam and the use by the company, it was worth $500.00. No value was ever established for the soil removed from the Loehde land (Appellants' Appendix 127; Finding 16); and as the court found: "There was sufficient other soil in general locale that the defendant power company could have used in constructing the Petenwell Dam without disturbing plaintiffs' land." (Finding 17; Appellants' Appendix 127.)

There was a long trial with the plaintiff given every opportunity to produce evidence of his claim, and the learned district judge gave the plaintiff great liberty in introduction of testimony and gave the most careful consideration to the case. His decision was the result of a very fair and careful analysis of the testimony. (Appellants' Appendix 119-125.) In that decision the court says: "There is testimony in the record to the effect that there was other soil which was suitable for dam and dike purposes available in the area and which was owned by the defendant power company. Accordingly, there was no showing made

as to the actual value of the soil taken. This being the case, plaintiffs have shown no damage based on the value of the soil taken. (Appellants' Appendix 123.) The court accordingly held that the damages to the plaintiffs was the value of the land before the soil was removed and the value after.

There was undisputed evidence that the land in question was low and subject to frequent floodings. (Appellants' Appendix 66.) It is undisputed that Mr. Loehde wrote to Mr. Fuller under date of March 12, 1948: "Should an emergency arise relative to use, the company is at liberty to act on necessary construction work *and we will agree on a settlement later.*" And in the same letter: "This met with his approval and he (Thiele) expressed a desire to join you and I in a joint cooperative program with reference thereto, with a conveyance to the three of us of a property that the company had no use for and which we could adjust between us and which would have speculative value and would be '*fair value*' today *for the forty acres* they need on the river below the power dam at Necedah." And then he instructs Fuller to have a deed prepared which would be placed in escrow and they would get together and agree on a deal, and he expresses in the letter that the company has a definite purpose for the Loehde forty acres and that his purpose is to cooperate "through you to the end that *you will acquire the same for the company at a fair value.*" The *fair value* now attempted to be recovered from the defendant company is $160,000.00!

Plaintiffs offered no evidence as to the value of the Loehde twenty-five acres before and after the taking but testimony of the defendant, by the witness Walter Buchan-

an, was that the land was worth more now than it was before the taking. (Appellants' Appendix 88.) The testimony of Oscar Waller, who lived in that area for forty-two years, was: "In my opinion Loehde's land was worth about $10.00 an acre, or a total for 30 acres of about $300.00. I think it's worth just as much now for recreational purposes, probably more." (Appellants' Appendix 92.) The testimony of Marvin Nelson, another witness, was that: "It was worth something less than $10.00 an acre. It is more desirable now for outing purposes than it was before because of the access to the water and has a higher value." (Appellants' Appendix 94.) A real estate expert and appraiser, Franklin D. Graham, who is highly qualified as shown by the record (Appellants' Appendix 100), testified that the property before taking was worth $760.00 and after flooding $500.00. (Appellants' Appendix 100.) The testimony of Mr. Graham is the only positive testimony as to value and as accepted by the court.

The court in its decision says: "The average elevation of plaintiffs' land prior to excavation was 96 feet; that the average elevation of the land since the excavation is 92 feet; that the water table of the river is now up an average of 2 to 4 feet." (Decision; Appellants' Appendix 122.) The court in its opinion and decision further says: "Plaintiffs did not prove by any witness the value of the land before and after. Defendant by a number of witnesses showed that the land was of more value subsequent to the construction operations than it was prior thereto, but defendants' expert witness testified that the land was worth $760.00 prior to the construction of the dams and is now worth $500.00. The plaintiffs have been damaged $260.00." (Appellants' Appendix 124.) The court further says in his

decision: "Plaintiffs advanced the theory that the measure of damage is the value per cubic yard of the soil taken from plaintiffs' land. If this be the only method for measuring damage, plaintiffs have failed to prove any damage as there was no competent testimony introduced to show the value of the soil taken. Plaintiffs attempted to show the value of the soil removed by their witness Kaiser, who stated that he would have offered 15¢ per cubic yard for the soil taken off plaintiffs' land *if he had no other place to secure the soil*, but if he could purchase other land for borrowing purposes, then he would not pay 15¢ per cubic yard. He further testified the value of 15¢ per cubic yard would be contingent on there being *no other soil available at a lower price*. There is testimony in the record to the effect that there was other soil which was suitable for dam and dike purposes available in the immediate area and *which was owned by the defendant power company*. Accordingly, there was no showing made as to the actual value of the soil taken. This being the case, plaintiffs have shown no damage based on the value of the soil taken." (Appellants' Appendix 123.) Also see cross-examination (Appellant's Appendix 40) where he admitted that, if there was land nearer, this testimony would not be correct.

ARGUMENT

I. THE UNDISPUTED EVIDENCE SUPPORTS THE FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE LOWER COURTS.

Respondents contend that the judgment of the Court of Appeals is correct and that the opinion is a proper exposition of the controlling law. The only questions are as to the difference in the value of the land before the trespass and the value after the trespass, and as to whether an injunction should be entered forbidding further trespass. Such an injunction was so entered so this issue becomes mute.

In the case of *Zombrowski vs. Wisconsin River Power Company*, 267 Wis. 77, 64 N. W. 2d 236, it was held that the difference between the value of the land before and the value afterwards was held to be a proper measure of damages for the partial inundation of property.

In the later case of *Blumer vs. Wisconsin River Power Company*, 6 Wis. 2d 138, 94 N. W. 2d 149, the same criterion was approved as the measure of damages. The District Court found, based upon the undisputed testimony, that the value of the property before the trespass was $760.00 and was worth $500.00 afterwards or a difference of $260.00. The Circuit Court of Appeals at the time of the appeal and later confirmed upon a motion for rehearing that there was nothing erroneous in the court's determination. Much discussion is advanced by petitioners that there was a willful trespass. The lower courts determined a license had been given to the respondents by the petitioners to enter upon their land and utilize it in contemplation of a trade of land

to be effectuated at a later date. It is, however, unimportant inasmuch as the measure of damages is identical whether the trespass was innocent or willful. All of petitioners' testimony, evidence and argument is in support of a theory which is not the law in the State of Wisconsin. To grant petitioners' petition would, by necessity, call upon this court to review and pass upon the facts which have already been thoroughly analyzed by the District Court and twice by the Court of Appeals. It would require the resolution of questions of fact decided adversely to the petitioners in the lower courts.

II. THE PETITION CONTAINS NO ISSUE WHICH WOULD COMMAND REVIEW.

The petition for writ of certiorari submitted by the petitioners contains no basis for review as promulgated by Rule 19 of the Supreme Court Rules. There is not a question involved here of a state court having decided a federal question. There is no showing that a decision has been rendered in conflict with a decision in any other court of appeals on the same issue. There is no state or territorial question. There has been no federal question raised by the issues of this matter, nor has there been any showing that the courts departed from the accepted and usual procedure or that the court of appeals sanctioned any departure by the district court so as to affect this court's power of supervision. Also, the issues of this case are unique to this case itself and are not of such a general importance as to justify a review.

CONCLUSION

It is respectfully submitted that the petition for certiorari and the record of this case fail to disclose any question of such importance as to warrant a review by this Court, and that, therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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PETITIONERS' REPLY BRIEF

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent, Wisconsin River Power Company, in its brief in opposition has not forthrightly answered or attempted to answer the substantial reasons for granting the Writ of Certiorari specified in petitioners' petition. The main issues in this case are:

1. Are the petitioners entitled to an injunction enjoining respondent Power Company from flowing water on petitioners' land?

2. Did the lower court err in granting petitioners only $260.00 for wrongfully converting 320,000 cubic yards of soil

from the petitioners' land, instead of granting substantial damages ?

The basic question to be answered by this Court, before either of the above issues can be decided is:

DID THE POWER COMPANY HAVE ANY RIGHT TO EXCAVATE AND FLOOD PLAINTIFFS' LAND?

For the Power Company to stress the manner in which Loehde acquired the land forty years ago, the amount paid for the land at that time, and its value today for recreational or other purposes are all so much smoke to hide the real question set out above. For if the Power Company had no legal right to remove the soil and flood the land, it must now be required to remove the water which it continues to direct onto the plaintiffs' land, and pay for the soil taken. The law, as any first year law student knows, is that a man cannot be deprived of his property without his consent.

In order to induce this Court to believe that the Power Company had a right to do what it did, the Power Company in its brief, commencing on line 5 of page 3, stated:

> "Loehde wrote Mr. Fuller, authorizing the Company to enter on his land and use it for whatever need it had for the same."

That statement simply *is not true*, and there is no evidence of any kind to support it.

Loehde's letter to Fuller of March 13, 1948 (Exh. 7 - Ap. 105) is the only evidence on the subject of use of the land, and it states that the Company may act on "necessary construction work" and perform "emergency matters of minor importance", and Loehde specifically provided that no action could be taken with respect to the land unless "an emergency arise relative to

use." How can it possibly be said that the Power Company had the right to use the land for whatever need it had when the owner said that the work was to be constructive (not destructive) and of minor importance?

Loehde testified that "emergency *** construction work *** of minor importance" was to bring equipment and electric lines across the land, construction of temporary buildings usually erected below dam projects and temporary storage of vehicles and supplies (Ap. 64-65). As a matter of fact, during the construction of the dam, land on the opposite side of the Wisconsin River from the Loehde land was actually used for those precise purposes. At no time did any officer or employee of the Power Company ever ask Loehde for permission to remove soil from his land or flood it. (Ap. 51-53) And such right was never given.

In Loehde's letter to Fuller of March 13, 1948, Loehde stated that as to such "emergency matters . . . you (Fuller) would be in charge and protect my interests." Fuller tried to protect Loehde's interests. He knew there was no license or permission to remove the sand, flood the land, and make a lake of it. He told Thiele, the Power Company's President, "not to enter without seeing (Loehde) first" (Ap. 54) Thiele's only excuse for disregarding Fuller's instructions was that "time was running . . . I couldn't wait." (Trans. 1st trial, p. 189, Appendix on 1st Appeal to C.C.A. pp. 47-48). Thiele did not deny these admissions although he was a witness upon the first trial.

Respondent, on pages 2 and 3 of its brief refers to a deed which Loehde prepared (Exhibit 13) and deposited in escrow at the Necedah Bank. It might seem from an examination of respondents' brief that this was a regular fee simple deed. It should be clearly understood, however, that this was the "seepage deed" referred to on pages 5 and 6 of our petition. The seepage deed contained many reservations and limitations, and for that reason was rejected by the Power Company. The Loehdes

never gave or offered the Power Company a broad fee simple deed.

The basic error in the decisions of the lower Courts is the finding that the Power Company had a license to remove the soil (Finding 11) Loehde's authorization to perform "necessary construction work" and "emergency matters of minor importance" was premised on the specific condition precedent that "an emergency arise relative to use". Thus, if there were no emergency relative to use, there was no right to use the land. That is plain language, and it cannot possibly be interpreted to mean that recipient of the right may use the land if he is unable to show that there was an emergency.

Respondent, on page 7 of its brief has shown that there was no emergency, and consequently no license. It said:

> "There is testimony in the record to the effect that there was other soil which was suitable for dam and dike purposes available in the immediate area, and which was owned by the defendant power company."

The Court also found (Finding 17) that there was other soil the Power Company could have used "without disturbing plaintiffs' land."

That being true, there simply was no license.

Throughout the decision of the District Court and the Court of Appeals is the thread that there was a license and that there was a consent to the excavation by Loehde. The effect of this erroneous finding and conclusion is that petitioners have effectively been deprived of their property. This is the basic finding in this case, since all other substantial findings and conclusions of the decisions are built upon it.

It is true that there had been a course of dealing between Loehde and the Power Company, but no deal was ever worked

out. In the first appeal the Court of Appeals in its decision stated: (277 F (2d) 656)

> "The transaction was never consummated. In addition the defendant affirmatively rejected acceptance of a conveyance on the terms and conditions contained in that deed. Although Loehde's correspondence indicated a willingness to deal, no deal was ever agreed upon or concluded."

We contend that that decision was right. No transaction was ever consummated and no deal was ever agreed to or concluded. Also, no license was ever effective and no consent was ever given, because as the Power Company itself proved, there was no emergency need for the Loehde soil.

Even in Finding 11 and Conclusion 4, the District Court found and concluded that the license terminated when the soil had been removed in April of 1948. The first flooding did not occur until eight months later in December of 1948, and the increased flooding until the Castle Rock Dam was closed over two years later in 1950. See pages 11 and 12 of the petition. Thus, even if there were a license to remove the soil, that was no justification for the flooding which occurred long afterwards and long after the termination of the alleged license.

Petitioners respectfully request that this Court reverse the erroneous finding that there was a license and reverse the conclusion that there was a consent given by Loehde to destroy and flood his land. As pointed out in the petition, the finding that there was a license is based entirely and exclusively on documentary evidence. It was not necessary that the lower courts weigh conflicting testimony on whether a license was given, because there was no testimony on license. The finding is based exclusively on Loehde's letter of March 13, 1948 (Exh. 7 - Ap. 105). This Court has held, and the rule is that where a finding is based exclusively on documentary evidence, the reviewing court is not precluded from changing the finding of

the lower court. *United States v. U. S. Gypsum Co.*, 333 U.S. 364, 92 L. Ed. 746.

If this one erroneous finding is reversed by this Court, the other findings and conclusions based upon the false premise may be changed in a simple manner to arrive at a fair and equitable judgment. To right this basic wrong calls for the exercise of this Court's power of supervision.

CONCLUSION

The facts of this case clearly warrant a review by this Court. For the reasons stated in this brief and the petition, the petition for writ of certiorari should be granted.

November 19, 1962

Respectfully submitted,
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